Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 8[redacted] 91

SAMUEL PEELA, TRADING AS SELWELL BLOUSE COMPANY, PETITIONER,

v.

LOUIS HUBSHMAN, TRUSTEE IN BANKRUPTCY OF SAMUEL PEELA, TRADING AS SELWELL BLOUSE COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ARCHIBALD PALMER,
Counsel for Petitioner.

MAX L. ROSENSTEIN,
Of Counsel.

(33,289)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 837

SAMUEL PRELA, TRADING AS SELWELL BLOUSE COMPANY, PETITIONER,

against

LOUIS HUBSHMAN, TRUSTEE IN BANKRUPTCY OF SAMUEL PRELA, TRADING AS SELWELL BLOUSE COMPANY, RESPONDENT.

To the Honorable the Chief Justice and Associated Justices of the Supreme Court of the United States:

The petitioner above named, pursuant to leave granted to him by the United States Circuit Court of Appeals for the Second Circuit on the 6th day of February, 1928, hereby submits his petition to review a judgment of that court rendered on the 9th day of January, 1928 (R., 138), which affirmed an order of the United States District Court for the Southern District of New York adjudging the petitioner in contempt of court for failure to comply with the terms of a turn-

over order made against your petitioner, and the imprisonment of your petitioner is sought under Section 11, Subdivision 13 of the National Bankruptcy Act, the original turnover order being presumably based upon the provisions of Section 11, Subdivision 7.

Statement of the Case.

An involuntary petition in bankruptcy was filed on the 22d day of November, 1924, against the bankrupt. At the time of his bankruptcy he was engaged in business as a manufacturer of tunics and blouses, the same being articles of ladies' wearing apparel. An adjudication in bankruptcy followed and a trustee elected.

A turnover proceeding was commenced by the trustee seeking to recover 6,124½ yards of silk valued at $8,512.70, or the proceeds of the sale thereof, alleged to have been unaccounted for by the bankrupt. In addition, the trustee sought to obtain the return of cash amounting in the aggregate to $1,836.78 (Record, fols. 10 to 15).

The referee in bankruptcy found for the trustee and directed that the merchandise and moneys claimed by the trustee be turned over by the bankrupt. The finding of the referee was predicated upon the hypothesis that the kind of blouses manufactured by petitioner in the ordinary course of trade required one and one-half yards of material per blouse (Record, fol. 3).

The referee disbelieved the testimony of the bankrupt that the principal product of the bankrupt's factory was tunics, which required approximately twenty-five yards of material to the dozen. The referee de-

clined to accept the explanation that the cash aggregating $1,836.78 was accounted for by the bankrupt, the same having been disposed of as far back as six months preceding the filing of the petition in bankruptcy.

The referee's order having been affirmed by the district court, an application for leave to appeal therefrom was denied by the circuit court of appeals.

Upon an application to punish the bankrupt for contempt for failure to comply with the turnover order, certain issues were raised by the answer of the bankrupt and supporting affidavits tending to show that none of the property required to be turned over by the turnover order was in fact concealed. New evidence in support of the bankrupt's position was thus available for the first time, prior counsel for the bankrupt having failed to present the same. This evidence, if adduced, would have tended to exonerate the bankrupt from liability under the turnover order and would have explained away the shortage of merchandise, and unquestionably would have accounted for the cash in question.

The district court made its order directing that a hearing on the issues raised by all of the pleadings referred to be had before the referee. These affidavits and the order in question appear at folios 88 to 159.

When the bankrupt attempted to offer evidence by way of exoneration, the court below declined to receive the same and considered the turnover order as conclusive from the date of its entry, and directed that any explanation of the disposition of the property must commence with the date of such order.

Such direction by the court below made it impossible for the bankrupt to offer the evidence which he claimed was made available to him, and the refusal of the court below to accept such evidence over the objection of counsel, it is contended, was contrary to law and a denial of the bankrupt's constitutional rights.

The bankrupt contends that the order of the district court which directed a hearing as to his ability to comply with the turnover order granted him "a day in court" and was one of the due processes of law, the benefits of which he was fully entitled to receive. Furthermore, the bankrupt contends that it has not been shown by proof beyond a reasonable doubt that he has concealed or withheld property from his trustee, or that he is able to comply with the turnover order by the same measure of proof. The bankrupt, having thus been precluded from offering any evidence antedating the date of the turnover order, was in no position to offer any evidence by way of exoneration. The court below, therefore, adjudged the petitioner in contempt and directed his commitment.

The Circuit Court of Appeals for the Second Circuit affirmed the order of the district court (R., 140).

From an examination of the prevailing opinion of the circuit court of appeals, it is obvious that a controlling point in the determination of said appeal was the fact that no evidence was offered by the bankrupt to show what had been done with the property since the adjudication.

The order of the district court was affirmed, one circuit judge dissenting. The legal reasons for the affirmance were set forth in a case handed down simultane-

ously with the case at bar in a proceeding entitled "Oriel, Confino & Company," 22 Fed. (2d), —, in which proceeding similar propositions of law were involved. The court substantially held that the turnover proceedings, being civil in nature, proof beyond a reasonable doubt was not necessary. The same granted leave to your petitioner to present this petition for a writ of certiorari and granted a stay of proceedings pending the same.

A certified copy of the entire record in the case, including the appeal to the United States Circuit Court of Appeals for the Second Circuit, is submitted herewith as an exhibit to this petition.

The Statute Involved.

The statutes for the violation of which your petitioner contends he is entitled to relief from this Court, in so far as the same are material, are as follows:

Article IV of the Constitution of the United States of America, which provides:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury • • • nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property without due process of law;*"

Section 11 of the National Bankruptcy Act, which provides that courts of bankruptcy shall have jurisdiction at law and in equity, Subdivision (7):

> "Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;"

and Subdivision (13):

> "Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;"

Reasons for Granting the Writ.

Your petitioner respectfully submits that the writ should be granted for the following reasons:

(1) That the decision of the Circuit Court of Appeals for the Second Circuit herein is inconsistent and at variance with its own determinations.

In re Weber, 290 Fed., 404, in which case the court, in reviewing a turnover proceeding against the bankrupt, made the following observation, which was practically literally followed by the petitioner in the case at bar:

> "If he has been misadvised and finds himself for that reason in the position of being punished for not doing what it was impossible to do, presumably upon an application to purge himself of the contempt, he would be allowed to submit evidence to show facts exonerating him, which he has heretofore failed to do."

In the case at bar the referee declined to accept any testimony offered by your petitioner to explain his inability to comply with the turnover order, although the order of reference made by the district court di-

rected that all of the issues on all of the pleadings be heard. This order of the district court (Record, fols. 158 to 159) was never set aside, vacated or annulled, and the trustee took no appeal therefrom. This order, even though improvidently granted or irregularly obtained, should have been respected.

This theory was advanced by the circuit court of appeals in its opinion of affirmance *In re* Oriel, Confino & Company, 22 Fed. (2d), —, and reliance upon Cape May R. R. Co. *v.* Johnson, 35 N. J. Eq., 422, was placed as authority.

(2) The findings of the court below were based upon a mistaken theory followed by the accountants for the trustee and adopted by the court below, and a gross misconception of the facts, and the methods of the trustee in establishing his case before the referee has been condemned in at least one other instance by a district court having before it a similar proceeding. *In re* Magen, 18 Fed., 288, the court condemned cases built up by circumstantial evidence, particularly by expert accountants.

(3). The learned circuit court of appeals, in ruling that merely a preponderance of the evidence was necessary, is at great variance with that of the circuit courts in the following instances:

First Circuit: *In re* Annie M. Cole, 144 Fed., 392; *In re* Goodrich, 184 Fed. Rep., 5.

Second Circuit: *In re* D. Levy & Co., 142 Fed., 442.

Third Circuit: Subkinsky *v.* Bodek, 172 Fed., 340.

Fourth Circuit: Kirsner *v.* Taliaferro, 202 Fed. Rep., 51.

Fifth Circuit: Stuart *v.* Reynolds, 204 Fed., 709; Samuel *v.* Dodd, 142 Fed., 68.

Sixth Circuit: Johnson *v.* Goldstein, 11 Fed. (2d), 702.

Seventh Circuit: Freed *v.* Central Trust Co., 215 Fed., 873.

Eighth Circuit: Boyd *v.* Glucklich, 116 Fed. Rep., 131.

Frender & Alpine, Bankruptcy No. 38283, decided Aug. 31, 1927; Opinion by Knox, D. J., So. Dist. of N. Y. (unreported opinion).

In the interests of justice, your petitioner prays that this Court review the record and the proceedings of the court below, for the following reasons:

(1). To determine whether your petitioner has had the benefit of the constitutional safeguards with respect to the provision that your petitioner be not deprived of his liberty without due process of law;

(2). That there being grave uncertainty of your petitioner's ability to comply with the turnover order, that imprisonment of your petitioner for failure so to do is inconsistent with and contrary to established law;

(3). That the questions of law involved are of grave and substantial importance to the mercantile world and to bench and bar of this nation;

(4). That a definite declaration is necessary by this Court to set at rest the conflicting opinions of the various circuit courts of the country and the application of the law in this regard.

Dated February 21, 1928.

SAMUEL PRELA,
Petitioner.

ARCHIBALD PALMER, Esq.,
Attorney for Bankrupt.

State of New York,
City of New York,
County of New York, ss:

Samuel Prela, being duly sworn, deposes and says that he is the petitioner named herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

SAMUEL PRELA.

Sworn to before me this 21st day of February, 1928.

SAUL RUBIN,
Notary Public, Kings County.

Kings Co. Clerk's No. 291, Register's No. 8337. Certificate filed in New York County.

N. Y. Co. Clerk's No. 846, Register's No. 8566. Commission expires March 30, 1928.

APPENDIX TO PETITION.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

In the Matter of SAMUEL PERLA, Trading as SELWELL BLOUSE COMPANY, Bankrupt-Appellant.

Before MANTON, L. HAND, and SWAN, circuit judges.

OPINION.

Appeal from the District Court for the Southern District of New York.

An order was entered punishing the bankrupt for contempt of court in having wilfully disobeyed an order directing him to deliver over to his trustee merchandise and money, and committing him to imprisonment for failure so to do. Order affirmed.

Archibald Palmer, Esq., attorney for bankrupt appellant.

Max L. Rosenstein, Esq., of counsel.

George Lion Cohen, Esq., attorney for trustee appellee.

MANTON, *Circuit Judge*:

The appellant was adjudicated a bankrupt and thereafter was directed to turn over to his trustees merchandise and pay over money. He failed to do so. A mo-

tion was made to punish him for contempt, which resulted in the order appealed from. The motion to direct the appellant to turn over the property in question was referred to the referee in bankruptcy, who took testimony in a protracted proceeding. The appellant had full opportunity to present all his evidence, but called no witnesses to support his present affidavit, which sets forth an excuse in opposition to the order appealed from. The referee's order directing him to turn over the property, dated November 9, 1926, was affirmed by the district judge. An application was made to this court for leave to appeal, which was denied. A reargument of the motion to turn over was applied for in the district court, and denied. Thereupon the trustee, upon affidavits, moved to punish for contempt. An answer was interposed and affidavits in opposition were filed. The matter was again referred to the referee in bankruptcy, who took testimony, but he held that the order in the turnover proceedings made out a *prima facie* case against the bankrupt, and that the burden was on the bankrupt to go forward with evidence tending to show that since the date of the turnover order he had disposed of the property then found to be in his possession or control and directed to be turned over to the trustee. No evidence was offered by the bankrupt to show what he had done with the property since he was adjudged a bankrupt. The district court affirmed the report of the referee and adjudged the bankrupt in contempt.

On this appeal it is argued that it was error below to refuse an opportunity to the appellant to explain (1) his inability to comply with the turnover order, and (2) that the appellee had failed to establish beyond a reasonable doubt the fact that the appellant was concealing moneys and properties of the bankrupt, and (3) that there is a failure of proof to sustain the claim

that the appellant is presently able to comply with the order to turn over the property.

These claims were advanced in the Matter of Oriel & Confino, decided this day, and for the reasons there stated and upon that authority, we hold that a motion to punish for contempt for failure to obey a turnover order is a civil proceeding. A disobedience of the order to turn over presents a *prima facie* case of contumacy for punishment. The burden rests upon the moving party to establish, not beyond a reasonable doubt, but by a fair preponderance of proof, such contumacy. Having been directed to turn over property, it is presumed that the offender continues in his wilful and deliberate conduct when he fails to obey the order. Applying the rule stated in that opinion, it follows that this order must be affirmed.

Order affirmed.

Judge Hand dissents.

Certificate of Counsel.

I, Archibald Palmer, of New York City, N. Y., an attorney regularly admitted to practice in the Supreme Court of the United States of America, and the attorney for the petitioner herein,

Do hereby certify that in my opinion the petition herein is well founded as to matters of fact and as to matters of law, and that the case identified thereby is such that the prayer of the petition should be granted by this Honorable Court.

Dated February 23, 1928.

ARCHIBALD PALMER,
Counsel to Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 837 91

SAMUEL PRELA, TRADING AS SELWELL BLOUSE COMPANY, PETITIONER,

against

LOUIS HUBSHMAN, TRUSTEE IN BANKRUPTCY OF SAMUEL PRELA, TRADING AS SELWELL BLOUSE COMPANY, RESPONDENT.

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

The opinion of the court below is reported in Volume 22, Fed. (2d).

The date of the judgment of the circuit court of appeals sought to be reviewed by this Court is January 9, 1928 (R., 138).

A statement of the case is contained in the petition herein.

The summary of the argument is set forth in the subject index.

Point I.

The Order of the District Court, Which Granted to the Bankrupt an Opportunity to Present Evidence by Way of Exoneration, Was a Lawful Order of the Court, and a Denial of the Benefits Thereof, with Resultant Imprisonment of the Bankrupt, Constitutes a Violation of Article V of the Constitution of the United States.

The trustee presented his petition to have the bankrupt adjudged in contempt of court for failure to comply with the turnover order. In response thereto, the answer of the bankrupt, and the affidavits of his wife, Mollie Prela; Jacob Cohen, his cutter; Jacob Rosen, his salesman; Philip Goldfrank and Philip Diamond, customers of the bankrupt, raised the precise question as to whether the bankrupt ever concealed the property directed to be turned over, and if a hearing on the evidence available through the medium of the affiants established no such concealment, then the effect of the turnover order, of necessity, would have failed and been annulled.

This order of the district court contained no limitation as to the date from which the explanation was to have commenced.

The court below declined to receive evidence designed to show that there was no basis for the turnover order in the first instance, and that the findings of the

referee, based upon the theory of the accountants, was in fact the result of a misconception of the facts and a grossly mistaken theory. Although the order of the district court, which directed a hearing on all of the issues, was never vacated, set aside or annulled, yet the court below refused to permit evidence to be adduced in support of the issues raised by the bankrupt.

In re Oriel, Confino & Company, decided by the Circuit Court of Appeals for the Second Circuit, simultaneously with the decision by the same court in the case at bar, the court referred to the finality of effect of an order in the following language:

> "Even if it was improvidently granted or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority. Cape May R. R. Co. *v.* Johnson, 35 N. J. Eq., 422."

The order of the district court was not given the respect which it was entitled to receive, and the consequent denial of a hearing to the bankrupt under the terms of this order makes clearly apparent the inconsistency of the rulings of the Circuit Court of Appeals for the Second Circuit.

The bankrupt is in jeopardy of being imprisoned for failure to comply with the turnover order. He has consistently denied withholding any property from his trustee. Upon ascertaining that through lack of proper advice he stood in danger of imprisonment, he besought an opportunity to explain by way of exoneration precisely in accordance with the suggestions of the same court *In re* Weber (*supra*), and yet, when

evidence was thus offered, he was precluded from presenting the same to such an extent as to prove valueless. The situation thus appears to be that on the one hand an opportunity to explain is provided to the bankrupt, and on the other hand, when he seeks to avail himself of the opportunity, he is denied a hearing.

Judging the events in the light of the expressions of opinion of the circuit court, we respectfully contend that the constitutional guarantees afforded to the bankrupt by Article V of the Constitution of the United States were unlawfully denied him.

Point II.

The Greater Weight of Authority Holds that There is No Conclusive Estoppel Which Precludes a Further Explanation or Hearing Antedating the Turnover Order with Which Authority the Court Below is at Variance.

Upon an examination of the authorities, it appears that there are two distinct lines of decision upon this subject founded upon different and divergent theories and conceptions of the law.

Some courts have held in substance that an order made by a referee, supported by some evidence, adjudging the bankrupt to have in his possession and control certain property belonging to his estate, and requiring that he turn the same over to his trustee, creates a presumption of the ability of the bankrupt to comply with the order and casts upon him the burden of proving the contrary, and that such a presumption

becomes final and conclusive unless the bankrupt gives an adequate explanation. This theory is supported—

In re Frankel, 184 Fed., 539.
In re Stavrahn, 174 Fed., 330.
In re Marks, 176 Fed., 1018.
In re Richards, 183 Fed., 501.

The other line of cases, and which seem to be more consistent with the finer sense of justice and the true principles of adherence to constitutional rights, hold in substance that in proceedings against a bankrupt for contempt for failure to obey an order requiring him to turn over money or property to a trustee *that the court should make a new and independent investigation* and should consider all material evidence relating to what preceded, as well as what followed, the referee's report, and from such investigation and from such evidence determine whether or not the order of the referee was justified, whether or not the bankrupt's disobedience is wilful and contumacious, and whether or not the bankrupt has the present ability to comply therewith. These cases are:

In re Davison, 143 Fed., 673.
In re Goodrich, 183 Fed., 106.
In re Cole, 163 Fed., 180.
In re Samel v. Dodd, 142 Fed., 68.
In re Elias, 240 Fed., 448.
In re Haring, 193 Fed., 168.

In the case last cited the court, at page 171, observes that to adopt the latter view seems to be more consonant with reason.

"The tendency to impose the burden of proving his innocence upon one in fact charged with the commission of a crime is a dangerous departure from those fundamental principles and constitutional guarantees which have been regarded as necessary for the adequate protection and sure safeguarding of the rights and liberty of every individual. Congress has not conferred upon referees in bankruptcy the power to imprison the bankrupt for contempt in failing or refusing to obey their orders. The court alone is authorized to exercise the power of commitment. Smith *v.* Belford, 106 Fed., 658-661; 45 C. C. A., 526; *In re* Shulman, 177 Fed., 191-193; 101 C. C. A., 361. The power of this court to imprison for an indirect contempt such as the one here alleged is undoubted; but it is also too well settled to admit of controversy *that such power should be exercised with clear and convincing proof establishing the guilt of the accused. A discretionary act cannot be done by proxy. To hold that the investigation by this court of respondent's guilt or innocence must begin where that of the referee terminates is to deprive this court of the discretion vested in it by law and to confer upon the referee the power to do indirectly that which he cannot do directly.*"

and further, at page 172:

"Accounting proceedings before the referee are purely civil, while proceedings for contempt are criminal in both their nature and consequences."

In re Elias (*supra*), the court, in passing upon the right of a bankrupt to have his "day in court" and an opportunity to be heard in defense to a contempt proceeding for failure to obey a turnover order aptly states the proposition to be:

> "What may he say in his defense—that he did not have the property when the order was made by the referee, or that since that time he has become disabled to deliver it?"

The court approves of the language of Judge Sessions *In re* Haring (*supra*), and while it is held perhaps because of the particular facts in the case that only a preponderance of the evidence was necessary to be adduced in behalf of the trustee, yet the court concludes its opinion, at page 461, with the following language:

> "That in doing so he must, giving due weight to the finding of fact by the referee, examine for himself the evidence in regard to the conduct of the bankrupt and all other relevant evidence before and since the passing of the order by the referee."

Guided by these principles, the court *In re* Elias (*supra*) denied the order imprisoning the bankrupt for contempt.

Judging the facts and circumstances in the case at bar, we contend that when the bankrupt offered credible proof in support of his plea for exoneration from liability under the turnover order, that he was not estopped. A refusal of the court below to accept such

proof which antedated the turnover order was therefore against the greater weight of authority, contrary to what appears to be the accepted doctrine of the higher courts of this country which have passed upon this proposition.

Point III.

The Acts Charged to the Bankrupt Constitute Concealment, Punishable by Imprisonment, and the Degree of Proof Should be of that Beyond a Reasonable Doubt.

The court below, in holding otherwise, is at variance with that of the better authority, and error was thus committed.

In re D. Levy & Company, 142 Fed., 442; C. C. A. (2d), which is the same court which passed upon the record in the case at bar, the court passed upon the question of contempt and said:

> "We are not unmindful of the general rule that the power of imprisonment for contempt in such cases should be exercised with great caution and only *upon proof which establishes the facts beyond a reasonable doubt, which must in any case be clear and convincing.*"

In re Small Shoe Company, 16 Fed. (2d), 205, the court strongly suggested, and it is reasonable to infer from the opinion, that the measure of proof in contempt proceedings is that of proof beyond a reasonable doubt.

Similar expressions tending to show that the same court apparently required a greater degree of proof in contempt proceedings may be discerned from its opinion.

In re U. S. *ex rel.* Palais *v.* Moore, 294 Fed., 852.
In re Plaza Shoe Co., 15 Fed. (2d), 278.
In re Weber (*supra*).

In the Small case the court, by Hon. Learned Hand, C. J., while not laying down a definite rule of the proof required, said:

> "If the criminal rule applies, the trustee would then have to satisfy the court beyond a reasonable doubt that the respondent had possession of the property at the time when the summary order was entered."

This theory of law is supported by the following authorities:

First Circuit: *In re* Annie M. Cole, 144 Fed., 392; *In re* Goodrich, 184 Fed. Rep., 5.
Third Circuit: Subinsky *v.* Bodek, 172 Fed., 340; American Trust Co. *v.* Wallis, 126 Fed., 464.
Fourth Circuit: Kirsner *v.* Taliaferro, 202 Fed. Rep., 51.
Fourth Circuit: *In re* Elias, 240 Fed., 448.
Fifth Circuit: Stuart *v.* Reynolds, 204 Fed., 709; Samuel *v.* Dodd, 142 Fed., 68.
Sixth Circuit: Johnson *v.* Goldstein, 11 Fed. (2), 702; *In re* Haring, 193 Fed., 168.
Seventh Circuit: Freed *v.* Central Trust Co., 215 Fed., 873.
Eighth Circuit: Boyd *v.* Glucklich, 116 Fed. Rep., 131.

In re Elias (*supra*), it was suggested upon the argument that it was within the power of the court to punish by imprisonment for contempt. In the discussion of the question by the court, the following appears:

> "Whatever distinction may have been drawn by courts in balancing arguments advanced to sustain conflicting views as to whether a contempt proceeding is civil or criminal it is, when used as a means of punishment for all practical purposes, punitive, and when the act complained of is made by statute criminal, the person charged should be prosecuted 'by due process of law' by indictment and a trial before those tribunals, grand and petit juries, with all of the safeguards which are guaranteed to the citizen by the Constitution and laws when liberty is involved."

citing Stuart v. Reynolds, 204 Fed., 709, in which case the court, at page 717, said:

> "In cases like the present case, where the bankrupt is accused of withholding and refusing to surrender large stocks of goods, and he answers on oath denying possession and control of them, his control and possession being an affirmative allegation of the trustee, it is not at all unreasonable to look at his answer as sufficient to secure his discharge unless evidence of the most convincing kind is offered to sustain the charge against him. The affirmative in such case would not be difficult to prove if the charge were true. *In cases where it is charged that he*

> *withholds large sums of money and he makes sworn denial, it is not consistent with the admitted rule that his guilt to authorize commitment must be proved to the exclusion of reasonable doubt to say that the burden can be put on the condemnor to prove his negative averment.*
>
> "In such cases the rule undoubtedly goes to this extent, to quote the words of an author of authority: 'It requires something like incontestable evidence or evidence beyond a reasonable doubt to overcome the denial. 1 Remington on Bankruptcy, Section 1844."

In conclusion, the court, at page 726, says:

> "It is to the interest of the public that the courts should retain the power to punish for contempt. The district courts, like this court, are the creatures of Congress, and their power is within legislative control. Rapalje on Contempt, Section 11, *Ex parte* Robinson, 19 Wall., 505; 23 L. Ed., 205. The way to preserve it is not to abuse it."

Bearing in mind that the case against the bankrupt herein was based upon a theory that one and one-half yards of merchandise was required to the manufacture of blouses, which theory the bankrupt seriously contests; in the light of the bankrupt's contention that tunics and not blouses were the principal product of his factory, and that he has credible evidence to support his contention, we respectfully contend that there has been an utter lack of proof beyond a reasonable doubt to justify the bankrupt's imprisonment.

Point IV.

The Record Disclosing a Serious Doubt of the Bankrupt's Ability to Comply with the Turnover Order, the Commitment Order, as a Matter of Law, is Invalid.

The report of the referee (fols. 238-239) contains no statement of any fact as to the present ability of the bankrupt to comply with the turnover order. It held that the trustee's *prima facie* case was made out by the turnover order, and it assumed merely that the bankrupt was able to comply therewith. When the bankrupt attempted to rebut the presumption of present possession, as indicated by the record, such opportunity was denied him by the referee.

The generally accepted rule of law that commitment for contempt should be exercised with extreme caution and only when the court is satisfied that the bankrupt has the present ability to comply was completely disregarded.

In re Oriel, Confino & Company, 22 Fed. (2d) (*supra*), Hon. Learned Hand, C. J., in his dissenting opinion, used the following language:

> "To me it seems intolerable that a man should be coerced by an indefinite imprisonment to do what it is uncertain that he can do at all. I recognize into all human affairs some doubts must enter, but when the stake is liberty, we should make sure if we can. If my brothers are right, although the finding in the summary order may rest only upon probabilities, the bankrupt

> is precluded from attacking its validity and he is sent to jail and kept there for as long as the judge sees fit."

The trustee's case was predicated upon a theory advanced by the certified public accountants.

In re Magen (*supra*), the district court expressed itself:

> "* * * I am distrustful of cases that are built up purely by circumstantial evidence, particularly by expert accountants * * *."

In re American Trust Company *v.* Wallis, 126 Fed., 464, in speaking of the power to punish for contempt, the court said:

> "This power, however, is far reaching and drastic and must be exercised with cautious discretion. If the bankrupt denies that he has possession or control of the property or if a third person in possession thereof claims to hold it not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent and that the case is one of simply concealment or refusal on the part of the bankrupt or the one in possession to deliver up the property as ordered, *it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order*"

and continuing further, the court states:

> "It is better to fall short of an absolutely perfect administration of the theory of the bankrupt law than to arm referee or court with pow-

ers of oppression alien to the spirit of our laws and institutions."

The proof in the case at bar is wholly circumstantial and rests upon a foundation of inference and presumption which may be very much at variance with the actual facts. At best, the case against this bankrupt is a doubtful one and it is deemed the paramount duty of courts to safeguard the rights and liberties of debtors who may be honest in spite of appearances against them and whom the law presumes to be innocent until their guilt is established.

There being an utter lack of clear and convincing proof required by the law to justify the bankrupt's commitment, the order of commitment should fall.

POINT V.

The Questions Presented are of Considerable Importance to the Mercantile Interests and the Bench and Bar of the Country, and a Definite Determination Will Set at Rest Conflicting Determinations of the Various Courts.

The writ of certiorari should be issued.

Respectfully submitted,

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